SUPREME COURT, U. S. No. 983 FEB 1 1968

In the Supreme Court of the United States

OCTOBER TERM, 1967

BATTLE MOUNTAIN COMPANY, PETITIONER

v.

STEWART L. UDALL, SECRETARY OF THE INTERIOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A13) is reported at 385 F. 2d 90. The opinion of the district court (Pet. App. A14-A28) is reported at 255 F. Supp. 382. The opinion of the Secretary of the Interior (Pet. App. A28-A32) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on October 18, 1967. A timely petition for rehearing

was filed on November 14, 1967, and denied on November 28, 1967. The petition for a writ of certiorari was filed on January 2, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether under the Act of June 4, 1897, rights to select public lands in lieu of those located in a national forest reserve were unassignable, and were extinguished when the forest lands were reconveyed to the party who had originally deeded them to the United States.

STATEMENT

In 1898, the San Francisco Mountains Forest Reserve was established in what is now the State of Arizona. Since earlier grants of land in the forest reserve area to the predecessor of the Sante Fe Pacific Railroad had left only alternative sections available for the reserve, an exchange was arranged under the Act of June 4, 1897, 30 Stat. 36, whereby Santa Fe relinquished its lands in the forest reserve in return for the right to "select in lieu thereof a tract of vacant land open to settlement * * *."

In 1915, Santa Fe executed two powers of attorney authorizing its attorneys-in-fact to exercise its right to select 160 acres of public lands in lieu of certain tracts relinquished in the San Francisco Mountains Reserve (Pet. App. A3). In 1956, Santa Fe, believing the 1915 powers of attorney had been lost, requested that the base lands be quitclaimed back to it

pursuant to the Act of April 28, 1930, 46 Stat. 257, 43 U.S.C. 872 (Pet. App. A34). This deed was executed by the Director of the Bureau of Land Management on October 12, 1956.

On January 12, 1961, petitioner filed an application with the Secretary of the Interior to select certain land in Oregon in lieu of those relinquished by Santa Fe in 1901 and produced the two 1915 powers of attorney authorizing it to act for the Santa Fe Pacific Railroad [1] (Pet. App. A29-A30). The Secretary rejected petitioner's application on the ground that the selection rights originally granted to Santa Fe were not assignable and that the in lieu selection rights were extinguished when the original land was reconveyed to Santa Fe in 1956 (Pet. App. A31-A32).

The district court reversed the Secretary, holding that the two 1915 powers of attorney had created assignable "scrip rights" which gave them a validity independent of the equities between the United States and Santa Fe (Pet. App. A19-A21, A27-A28). On appeal, the Ninth Circuit reversed, holding that the Secretary's consistent interpretation of the Act of June 4, 1897, as creating only exchange rights between the United States and the original owner or his agent, and not assignable "scrip rights," was a reasonable administrative construction of the statute which should be accepted by the courts (Pet. App. A13).

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[1] Subsequent to the reconveyance of the original land to Santa Fe, on August 7, 1957, these powers of attorney had been recorded with the Bureau of Land Management pursuant to the Act of August 5, 1955, 69 Stat. 534, 43 U.S.C. 274, note.

ARGUMENT

The only issue presented by this case is whether under the Act of June 4, 1897 the right to select land in lieu of forest land conveyed to the United States is a right which can be exercised only by the original landowner or whether the right is a freely assignable "scrip right."

The Secretary of the Interior has consistently construed the 1897 Act as creating only a right between the United States and the relinquishing landowner. Thus, shortly after the passage of the Act of June 4, 1897, the Secretary [2] issued an opinion that the statute "does not provide for the issuance of scrip in any form." Opinion of August 26, 1898, 28 L.D. 472. The history of the administrative construction of the 1897 legislation and the reasons for it were summarized in the Secretary's decision in *George L. Ramsey, by Ted E. Collins*, 58 I.D. 272, at pp. 294-295:

> As to this statute [Act of June 4, 1897], a fundamental point to be noted is that according to a long line of decisions the act contemplated *an exchange between two owners* and that nothing in it can be construed as indicating that it envisaged any other or different character of transaction. From the beginning however dealers and speculators in public land rights have persisted in treating the exchange right as scrip, a floating, assignable right, and have made persistent efforts to persuade the Department to this view. But the Department early decided that no

[2] In a letter prepared by Assistant Attorney General Willis Van Devanter.

> floating right was intended by the Congress; that this law does not provide for the issuance of scrip in any form or for the certification of a right of selection; and that to speak of a "scrip right" or "scrip land" under this legislation is inaccurate and tends to confuse and mislead.
>
> Under the act the Department had no power to *prevent* assignment and scrip treatment of the exchange right by its owner * * *. But it could and did *refuse to recognize assignments and assignees.* [Emphasis in original.]

The court below was clearly correct in holding that there was no reason to overturn this consistent construction of the statute by the "officers or agency charged with its administration". *Udall* v. *Tallman*, 380 U.S. 1, 16; see *Riverside Oil Co.* v. *Hitchcock*, 190 U.S. 316, 324-325.[3]

We note also that the issue presented by this case will not have substantial future significance. Approximately 5,000 acres of in lieu selection rights under the Act of June 4, 1897, were recorded with the Department of the Interior pursuant to the Act of August 5, 1955, 69 Stat. 534, 43 U.S.C. 274, note (Pet. App. A60-A-83), and only about 500 acres of in lieu selection rights were recorded under the Act of July 1, 1898, 30 Stat. 597, 620. Many of these land claims

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[3] Petitioner cites no case, either of this Court or any court of appeals, holding that in lieu selection rights under the Act of June 4, 1897, are assignable. While petitioner does cite *Begue* v. *Grizzly Live Stock & Land Co.*, 1 F. Supp. 229 (S.D. Cal.), as judicial recognition of the assignability of these selection rights (Pet. 7), the refusal of the Ninth Circuit in this case to follow that decision by one of its district courts leaves that opinion without validity as a precedent.

have already been satisfied either by quitclaims, patents or payment under the provisions of the Act of August 31, 1964, 78 Stat. 751, 43 U.S.C. 274, note. Since it is the intent of the Act of August 31, 1964, that all of these claims be disposed of by 1970, the acreage potentially affected by the decision below is diminishing rapidly.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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